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Supreme Court of the United States

OCTOBER TERM, 1951

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SUPREME COURT, U.S.

No. 401

KONRAD G. JOHANSEN,
Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR RE-HEARING

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

WILLIAM L. STANDARD,
Proctor for Petitioner,

By LOUIS R. HAROLDS,
A Member of the Firm.

LOUIS R. HAROLDS,
of Counsel.

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PETITION FOR RE-HEARING

KONRAD G. JOHANSEN, by WILLIAM L. STANDARD, his proctor, respectfully petitions this Honorable Court for re-hearing, alleging as follows:

I

The Court of Appeals had dismissed this suit by a divided Court, but without any analysis of the 1944 Amendment to the Compensation Act. This Honorable Court affirmed said dismissal, by a 5-4 decision on an opinion dated May 26, 1952.

II

Re-hearing is sought on the ground that this Honorable Court failed to consider the full impact of the 1944 Amendment of the Compensation Act on the petitioner's rights in that said amendment (58 Stat. 712) expressly provided for an election between compensation and any other pay-

ments from the United States to which the employee might be entitled by reason of his injury under any other Act of Congress.

The majority of this Honorable Court, in its opinion, construed the 1944 Amendment to the Compensation Act, as referring to a right of election between compensation on the one hand, and only vacation, sick, retirement, or similar benefits, on the other hand. The 1944 Amendment, however, does not contain any such words of limitation, nor is there anything in its legislative history which lends support to such an interpretation.

At the time the 1944 Amendment was adopted, there was already in existence the Public Vessels Act of 1925. Under the literal language of the Public Vessels Act, as the majority of this Honorable Court recognizes, a public vessel civilian seaman would seem to have a right to sue for damages, and the Courts had already held that there was a right to elect.

When Congress adopted the 1944 Amendment to the Compensation Act, it must therefore be deemed to have had in mind the remedy given by the Public Vessels Act, when it broadly and expressly provided for an election between compensation and any other payments "by reason of such injury or death under any other Act of Congress" (58 Stat. 712).

The statement contained in the opinion of the majority of this Honorable Court, on page 7 thereof, to the effect that Congress made no provision "for election between this remedy and any remedy that might be available under other Federal statutes", should therefore be re-examined in the light of the foregoing.

III

The legislative history of the 1944 amendment shows that the right of election which was made express therein, was intended primarily as a clarification and re-statement of existing recognized law (See pp. 5-6 of Petitioner's Reply Brief).

By this amendment (which was in effect at the time petitioner herein sustained his injury), Congress had merely inserted express language into the Compensation Act, which simply carried out the interpretation which the Courts had previously already given to that Act, ever since *Dahn* v. *Davis*, 258 U. S. 421.

The majority of this Court indicates, at p. 9 of its opinion, that prior to 1949, there was a divergence of view in the Courts as to the exclusiveness of the compensation remedy, and that this divergence extended to suits by government civilian seamen, seeking damages under the Public Vessels Act. However, the cases referred to by the majority of this Honorable Court, in support of that proposition, under footnotes 4 and 5, are readily and easily distinguishable except, perhaps, for *Lopez* v. *United States*, 59 F. Supp. 831 (S. D. N. Y., 1944). The *Lopez* case, unfortunately, does not contain many facts, or any careful analysis, and it does not appear clear from the District Court's opinion, whether the seaman involved there was a civilian, or a member of the military forces. Furthermore, it was decided October 10, 1944, and could not have affected the thinking of Congress, which had passed the amendment on July 1, 1944. The other cases may be commented upon as follows:

In *Posey* v. *Tennessee Valley Authority*, 93 F. (2d) 726 (C. C. A. 5th 1937), a shore-side laborer, constructing Wheeler Dam, was injured. The federal statute creating the Authority, provided that the Federal Compensation Act was to apply to government employees engaged on this

project. There being no other statute by which the government had consented to be sued for such injuries, the Court held that compensation was the man's exclusive remedy. At that time, the Federal Tort Claims Act had not yet been adopted by Congress, and the Public Vessels Act could not apply, since the laborer was not a civilian seaman employed by the government on a public vessel.

In *Parr* v. *United States,* 172 F. (2d) 462, a shore-side employee of the War Department was injured in 1945. The Federal Tort Claims Act having already been adopted, the Court held that he could elect between the remedy given by the Compensation Act, or sue for damages under the Federal Tort Claims Act.

In *Thomasen* v. *W. P. A.,* 47 F. Supp. 51, aff'd 138 F. (2d) 342, a W. P. A. shore-side employee was injured in 1948, which was prior to the enactment of the Federal Tort Claims Act. Since the W. P. A. was not a corporation for whose negligent acts the government had as yet waived liability, and since there was then no statute under which the man could sue for damages, compensation was properly held to be his exclusive remedy.

In *White* v. *T. V. A.,* 58 F. Supp. 776, a T. V. A. employee sued for Workmen's Compensation benefits by a suit in the Federal Court. The Court properly ruled that a claim for such benefits should be filed directly with the administrative agency set up by Congress for that purpose.

In *Lewis* v. *United States,* 190 F. (2d) 22, a government policeman was held to be in the same position as a member of the military forces injured in line of duty, and therefore entitled to benefits under the Workmen's Compensation Act, without the right to sue for damages. However, that case was decided in 1951, and would appear to have no bearing on the state of the law, as it was in 1944, when the Workmen's Compensation Act was amended, or in 1949, when it was again amended.

In *O'Neill* v. *United States,* 11 F. (2d) 869, aff'd 11 F. (2d) 871, the man involved was a member of the military forces, injured on active duty, and *Brady* v. *United States,* 151 F. (2d) 742, also involved a member of the military forces, and not a civilian, and so those cases have no bearing.

United States v. *Loyola,* 161 F. (2d) 126, held that a civilian seaman, employed by the government, had a right to elect between suing under the Public Vessels Act, or seeking a remedy under the Compensation Act.

Careful analysis of the cases, therefore, shows that at the time of the 1944 amendment of the Federal Workmen's Compensation Act, there was no divergence of views. On the contrary, the overwhelming weight of authority at that time, as shown by the cases previously adverted to in Petitioner's brief, was to the effect that such a seaman had a right to elect. The 1944 amendment to the Compensation Act ought therefore to be construed as meaning what it plainly says.

IV

The majority of this Honorable Court distinguished *Dahn* v. *Davis,* 258 U. S. 421, on the ground that there, the right to elect to sue the government for damages, was based on Section 10 of the Federal Control Act. But the right of election was derived by the Court in the *Dahn* case, from the Compensation Act, and not from Section 10. And Section 10 of the Federal Control Act, which gave railroad workers a right to sue for damages, gave no greater right than that given by Congress to maritime workers, by the broad and sweeping provisions of the Public Vessels Act.

V

The majority of this Honorable Court finally states that to allow public vessels' civilian seamen an election, while denying it to other merchant seamen, would seem discrim-

inatory. For that matter, to deny seamen employed by the government through the War Shipping Administration, a right of trial by jury, when it is allowed to seamen employed by private companies, is likewise discriminatory. Such decisions, however, must be made by Congress, under the legislative procedures, and should not be the function of the Courts.

WHEREFORE, petitioner respectfully prays that this Honorable Court grant a re-hearing in the above matter.

Respectfully submitted,

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Proctor for Petitioner,

By LOUIS R. HAROLDS,
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